Supreme Court, U.S.
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No. 95-1965

In The

Supreme Court of the United States

October Term, 1995

WILLIAM BREGAR,

Petitioner,

vs.

THE CITY OF CLEVELAND,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE A. PACE, JR. – 0043956
First Assistant City Prosecutor
Justice Center – 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 664-4850

Counsel of Record for the Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Prior to a Cleveland Indians baseball game on the evening of August 2, 1994, at approximately 6:00 p.m., the Petitioner stood outside of Gate A of Jacobs' Field baseball stadium, home of the Cleveland Indians, holding a sign measuring four feet by five feet with the words "A FIELD OF GREED." The Petitioner stood on private property, which is part of the Gateway Economic Development Corporation of Greater Cleveland's sports complex ("Gateway"). Gateway is a non-profit corporation created by private individuals and organized pursuant to Ohio Revised Code Section 307.696(A)(2).

Commander Sade, an off-duty Cleveland Police Officer working part-time in the capacity of Gateway security, approached the Petitioner as a result of a complaint from other security personnel. All security personnel, including off-duty Cleveland police officers, contract with and are paid by Gateway Corporation. Further, Gateway Corporation provided a four-hour training session for all security personnel to explain Gateway's policy concerning traffic and pedestrian control. Acting upon the complaint, Commander Sade informed the Petitioner that he was obstructing the flow of pedestrians going to the game. Commander Sade informed the Petitioner that he was free to display his sign if he moved over to the Ontario Street side of the stadium. Although he was argumentative, the Petitioner complied with Sade's request. He moved over to a safer place where he would not obstruct the flow of traffic.

The following evening, August 3, 1994, the Petitioner again displayed his sign in the safe area and did not impede the flow of traffic.

On the evening of August 4, 1994, the last game of the strike-shortened season, the Cleveland Indians game sold-out. Approximately 42,000 fans converged on the area for the game. Other people were protesting the impending baseball strike on that evening, including a man with a ten to twelve foot replica of Chief Wahoo, the Indians' mascot. The man was informed that he could not place his sign out on the open wall because of the volume of people walking by. The man, however, was allowed to take the sign into the stadium and display it there.

That same evening, the Petitioner returned to Jacobs' Field one hour prior to game-time. He did not have a ticket for the game. Commander Sade received another complaint that the Petitioner was on Gateway's private property and that his sign was impeding the flow of traffic forcing pedestrians, walking elbow-to-elbow, to walk into the curb lane of Ontario Street. Commander Sade, along with another police officer and a security supervisor, approached the Petitioner and informed him that he was creating a safety hazard by forcing fans to walk around him and into the busy street. Sade asked the Petitioner to move approximately eight feet to one side, where he could display his sign. In fact, more fans would have seen his message from the new position. The Petitioner refused to move the few feet.

Commander Sade then read the Petitioner the Criminal Trespass ordinance and informed him of Gateway

policy which prohibits anyone from distributing pamphlets, selling tickets, or doing anything which jeopardizes the fans' safety by impeding the flow of traffic. The Petitioner still refused to move. The Petitioner then pulled out a tape recorder and recorded the entire incident. Commander Sade asked the Defendant several more times to simply move a few feet over for pedestrian safety. Again, he refused and was arrested for Criminal Trespass.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. There is no First Amendment issue as Gateway is a private corporation and had a right to remove the Petitioner from its private property.

The Petitioner was on Gateway Corporation's private property at the time of his arrest at Jacobs' Field, thus he was not subject to the full protection of the First Amendment. Gateway Corporation is a private entity which reserves all of the rights and privileges of a private property owner. The United States Supreme Court has recognized that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. *Lloyd Corp. v. Tanner,* 407 U.S. 551, 570 (1972). Rights can collide when private property assumes some characteristics of public property. The Supreme Court, however, stated that private property does not "lose its private character merely because the public is generally

invited to use if for designated purposes." *Lloyd Corp.*, 407 U.S. at 569.

A. Gateway Corporation is an independent, private entity, not an extension of local government.

From Gateway's inception, state and federal courts have been called upon to decide whether Gateway is an independent private entity or an arm of local government. The Eighth District Court of Appeals of Ohio (Eighth District), in the present case, found Gateway Corporation to be a private entity. In its decision, the Eighth District relied upon *N. Ohio Chapter of Associated Builders and Contractors, Inc. v. Gateway Economic Dev. Corp. of Greater Cleveland*, No. 1:92 C.V. 0649 (1992, N.D. Ohio) (Pet. App. 2-49). In *Associated Builders*, the Federal District Court applied the two-pronged test announced by the United States Supreme Court in *N.L.R.B. v. Natural Gas Util. Dist. of Hawkins County, Tennessee*, 402 U.S. 600, 604-05 (1971), and found that Gateway was neither (1) created directly by the state, so as to constitute departments or administrative arms of the government, nor (2) administered by individuals who are responsible to public officials or to the general electorate. *Associated Builders*, Pet. App. at 37, 47. Therefore, Gateway Corporation was found to be a private entity.

The Petitioner, however, asserts that Gateway is an economic partner of the local government, and thus should be considered an arm of the government for purposes of First Amendment analysis. The Petitioner incorrectly relies upon *Lebron v. Nat'l R.R. Passenger Corp.*, ___ U.S. ___, 115 S.Ct. 961 (1995), to support his assertion. In

Lebron, the United States Supreme Court determined that Amtrak was a government agency for purposes of First Amendment analysis for three reasons. *Id.*, ___ U.S. at ___, 115 S.Ct. at 972, 974. First, the federal government mandated the creation of the corporation through the Rail Passenger Service Act of 1970. *Id.*, ___ U.S. at ___, 115 S.Ct. at 973, 974. Second, the corporation was created specifically to further stated government objectives, mainly to ensure that rail passenger service would remain a means of transportation. *Id.* Finally, the Supreme Court found that the government retained for itself, under the creating statute, the permanent authority to appoint a majority of the corporation's directors. *Id.*

The Eighth District, in the present case, concluded that *Lebron* was not controlling, and that Gateway was not a governmental actor or agency for the purposes of First Amendment analysis. *City of Cleveland v. Bregar*, No. 67999 (1995, 8th District, Cuyahoga County) (Pet. App. 1-18). Unlike the Passenger Service Act of 1970, which mandated the creation of Amtrak, Ohio Revised Code section 307.696 was not a directive. Instead of mandating the formation of a specific corporation, O.R.C. section 307.696 merely authorized non-profit corporations to form in conjunction with local government in any city in Ohio for the purpose of constructing and/or operating sports complexes. The Eighth District, in the instant case, correctly focused on the distinction between mandating and authorizing the formation of a corporation:

> Whether a non-profit corporation is a political subdivision depends not on whether its formation is mandated or merely authorized; the difference is whether its formation is attributable

> to private, rather than governmental, action. When a state mandates the creation of an entity, the entity is fairly called a governmental actor. When a state *allows*, instead of *mandates*, a local government to create an entity, that entity, if formed, is still a governmental actor, since it was a local government that formed it. Only if an entity is *allowed* to be formed by a *private actor* is the entity a nongovernmental actor.
>
> . . . *The statute enabling Gateway, however, merely allows local governments to enter into agreements with private entities who may form or not, as they wish, in order to pursue a goal in tandem with that local government.* "(Gateway's) contractual relations with . . . political subdivisions . . . do not transform (Gateway) itself into a political subdivision of the State." *Truman Medical Center, Inc. v. NLRB*, 641 F.2d 570, 572 (1981, 8th Cir.). (emphasis added).

Id., citing *Associated Builders*, Pet. App. at 23-24. The present case is distinguishable from *Lebron*. The Ohio statute permitted any Ohio city and/or county government to enter into agreements with private entities to develop and construct sports complexes. The Ohio Legislature did not mandate the formation of Gateway Corporation, as the federal government did with the Rail Passengers Act and the formation of Amtrak. Gateway was not created by a directive of the Ohio Legislature; instead, the statute allowed local governments to enter into agreements with private entities as local government planned its city's development. Thus, relations between Gateway Corporation and city and county government did not transform the private corporation into an entity of the state.

The Petitioner also incorrectly asserts that the "symbiotic relationship" test articulated in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), shows that Gateway Corporation is a state entity. *Burton* is clearly distinguishable from the facts presented in the instant case. In *Burton*, the land and the parking garage were state owned and operated. The State of Delaware entered into a lease with a restaurant to rent out some of the extra space available in the parking garage. The restaurant, however, discriminated against black customers. The Court held that "by its inaction . . . the State . . . not only made itself a party to the refusal of service, but has *elected to place its power, property and prestige* behind the admitted discrimination." *Id.* at 725 (emphasis added).

The present case is clearly distinguishable from *Burton* in that Gateway Corporation does not lease Jacobs' Field from the city or county. Gateway Corporation owns and operates the complex. The property needed to construct the complex was purchased by the Greater Cleveland New Stadium Corporation, not by the state. *Associated Builders*, Pet. App. at 7-8. Further, Gateway was the "builder, owner and operator of the sports complex itself" and and could enter into any leases necessary to operate the complex. *Id.* at 9. These powers clearly are characteristics attributable to a private entity, not to an entity controlled by the State. The "symbiotic relationship," therefore, is clearly lacking. Gateway Corporation is not a tenant on state-owned property. Gateway Corporation is an independent private entity, not an arm of the state.

B. The Petitioner stood on Gateway Corporation's private property, thus Gateway Corporation had the right to remove the Petitioner when he created a safety hazard to fans attending the Indians' game.

As Gateway controls private property, Gateway could remove the Petitioner from its premises. The First Amendment safeguards "the rights of free speech and assembly limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only." *Lloyd Corp.*, 407 U.S. at 567. The Supreme Court has further held that property does not lose its private character merely because the public is generally invited to use it for designated purposes. *Id.* at 569. The Petitioner was clearly on private property at the time of his arrest for Criminal Trespass. Gateway Corporation's property is private property which carries with it all of the rights, privileges and responsibilities of ownership. Game security, which is hired by Gateway Corporation, observed the Petitioner's sign creating a safety hazard for the thousands of fans entering the stadium. Commander Sade, acting on the complaint and in the capacity as Gateway security personnel, simply asked the Petitioner to move eight feet to the side to ensure the safety of the fans. The Petitioner refused. Commander Sade read the Petitioner the Criminal Trespass ordinance, yet the Petitioner still refused to move. The Petitioner was then arrested for Criminal Trespass. Gateway Corporation had the right to remove the Petitioner from its property when the officials observed a potentially hazardous situation. As Gateway Corporation is a private entity owning private property, and the Petitioner was

protesting on Gateway's property, he was not subject to the full protection of the First Amendment. Gateway Corporation, as a private property owner, did exactly what it was entitled to do. Therefore, the instant case does not present a constitutional issue for the Court to resolve, and the Petitioner's Writ of Certiorari should be denied.

II. If Gateway property is determined to be a public forum, the application of the Criminal Trespass ordinance is a reasonable time, place and manner restriction.

Arresting the Petitioner for Criminal Trespass outside of Jacobs' Field was a reasonable time, place and manner restriction as the placement of the Petitioner's sign outside of the stadium an hour before a sold-out Cleveland Indians game created a safety hazard to the thousands of fans attempting to enter the stadium. The state may place reasonable time, place and manner restrictions on speech that takes place in a public forum. The United States Supreme Court provided a three-pronged test to determine if such a restriction is reasonable. A restriction is justified if:

1) the regulation is content-neutral;
2) the regulation is narrowly tailored to serve a significant governmental interest; and
3) there are ample alternative channels for communicating the information.

United States v. Grace 461 U.S. 171, 177 (1983), citing *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983).

In the present case, the Petitioner displayed a large sign on Gateway property one hour prior to the start of the Cleveland Indians game. Over 42,000 fans were in attendance that day. An estimated 20,000 fans were attempting to enter the gate near where the Petitioner stood. The Petitioner's sign forced the fans moving elbow-to-elbow to walk into the curb-lane of a busy downtown street. The Petitioner, in exercising his right to free speech before game time in such a crowded area, engaged in an activity incompatible with the normal activity for this particular place at this particular time, which was to allow tens of thousands of fans to enter Jacobs' Field in a safe and orderly fashion free from interference and obstructions.

A. The time, place and manner restriction in this case was content-neutral.

The Petitioner's arrest was not an attempt to suppress the content of the Petitioner's message. "FIELD OF GREED." In a public forum, the government may not deny access to those who wish to express a controversial view, while allowing the use of that forum to persons whose views the government finds acceptable. *Police Dept. of Chicago v. Mosley* 408 U.S. 92, 95-96 (1972). In the present case, the Petitioner was not arrested because of the content of his speech, but rather because he was creating a significant safety hazard for Indians' fans trying to get to the game. Commander Sade testified at the Motion to Dismiss hearing that similar protests were held before and during the game. Sade testified that an unidentified man carried a ten to twelve foot high replica of

Chief Wahoo, the Indians' mascot, with a message similar to the Petitioner's sign pertaining to the impending baseball strike. The man with the large Wahoo sign had a ticket for the game and was permitted to take the sign into Jacobs' Field and display it during the game. Had Gateway wanted to suppress the fans' displays of anger concerning the inevitable baseball strike, officials would not have permitted any signs against the baseball strike into the stadium. Gateway officials clearly were not attempting to suppress the content of the Petitioner's message when the Petitioner was arrested. Therefore, enforcement of the Criminal Trespass ordinance was content-neutral and was not an attempt by the state to suppress the Petitioner's message.

B. The time, place and manner restriction was narrowly tailored to serve a significant government interest.

The government had a significant interest in moving the Petitioner from his original protest spot as the Petitioner created a safety hazard to the thousands of fans attempting to enter Jacobs' Field for the sold-out Indians' game. Further, the restriction of the Petitioner's protest was narrowly tailored to fulfill the government's interest in fan safety and orderly traffic flow. The United States Supreme Court has held that: a restriction narrowly tailored to serve a legitimate government interest

> need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government

> interest that would be achieved less effectively absent the regulation.

Ward v. Rock Against Racism, 491 U.S. 781 (1989). The appellate court in the present case stated that "the exercise of . . . free speech is not completely unfetterd in an area which is treated as a public fora for purposes of the First Amendment." *Bregar,* Pet. App. at 16, citing *Planned Parenthood Ass'n of Cincinnati v. Project Jericho,* 52 Ohio St. 3d 56 (1990). The Supreme Court of Ohio has held that the First Amendment rights *"do not include the right to imperil public safety* or to harass others in exercise of their rights." *Planned Parenthood,* 52 Ohio St. 3d at 59, citing *United States v. Dickens,* 695 F.2d 765, 772 (C.A.3, 1982) (emphasis added).

In *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 604 (1981), the Minnesota State Fair had a policy that required any organization wishing to distribute information or solicit donations to register and remain at a designated booth. The Krishna organization argued that one of its religious rituals required its members to mingle amongst the crowd to distribute and sell religious literature and solicit donations. The United States Supreme Court held that the state had a significant government interest in maintaining the orderly movement of the crowd and protecting the safety of the visitors at the fair. *Id.,* 452 U.S. at 651. The rule was narrowly tailored to fulfill the state's significant interest because all organizations had to register and remain in the designated area in order to ensure patron safety and the orderly flow of visitor traffic.

In the present case, similar to *Heffron*, fan safety and the orderly flow of traffic were the concerns of security officials. The Petitioner's protest occurred as thousands of people attempted to enter Jacobs' Field for a sold-out baseball game. Commander Sade explained to the Petitioner Jacobs' Field's policy prohibiting people from distributing pamphlets, selling tickets, or demonstrating in any way that would interfere with the pedestrian flow of traffic. The Petitioner's conduct not only impeded the fans' orderly movement into the stadium, but also placed the fans in danger by forcing them into the curb lane of game-congested Ontario Street. In the present case, as in *Heffron*, the state had a significant government interest in the orderly movement of the crowd and in ensuring the safety of the fans. Further, asking the Petitioner to move eight feet was not an intrusive or an unreasonable request. The government interest of public safety and orderly traffic flow could not have been effectively achieved in this particular area without asking the Petitioner to move a few feet to the side. Therefore, the restriction was narrowly tailored to promote the government interest by prohibiting all activities, not just those protesting against the baseball strike, which impeded the flow of traffic and the fans' safety.

C. The time, place and manner restriction afforded the Petitioner ample alternative channels for communication of his message.

The Petitioner was afforded alternative channels for communicating his anger with Major League Baseball and the impending strike as the Petitioner was asked by officials to move a mere eight feet from his original protest

spot. In *Lloyd Corp.*, 407 U.S. 551, the United States Supreme Court held that protestors had no right to distribute handbills in a privately owned shopping complex. The Court found that even with the protestors being denied access to the shopping center, there were adequate alternative avenues for communicating their ideas. *Id.* at 566. The Court found that the shopping center was surrounded by 66 linear blocks of public sidewalk and that the protestors would still have been able to reach their intended audience from the sidewalk since patrons of the shopping center had to cross the sidewalks to enter the complex. *Id.*

The Petitioner clearly had ample alternative channels for communicating his message to the intended audience. He merely had to move eight feet from his original spot. Commander Sade further testified that had the Petitioner moved that eight feet, the message on the sign would have been seen by a greater number of the fans. The Petitioner also had the option of going into the ballpark with the sign where 42,000 fans could have read his message. Therefore, Commander Sade's request was not unreasonable, and the Petitioner was afforded ample opportunity to have his message communicated to its intended audience.

D. The Criminal Trespass ordinance does not vest unfettered discretion in City officials to deny access to the forum in question.

The Supreme Court of Ohio in *W. Jefferson v. Robinson*, 1 Ohio St. 2d 113, 115, 205 N.E.2d 382 (1965), held that the power of an Ohio municipality to enact local

police regulations is conferred under the "Home Rule," Section 3, Article XVIII, of the Ohio Constitution. This grants Ohio municipalities the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations. The court in *Cincinnati v. Thompson*, Ohio App. 3d 7 (1994), held that a municipality may adopt and enforce an ordinance which constitutes an exercise of its power of local self-government or a police regulation. In that case, the court held that an ordinance proscribing the act of criminal trespass on a medical facility was a valid exercise of the city's police powers.

The Petitioner, in the present case, relies on *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 252 (1969), for the proposition that a government may not empower its officials to decide who gets to speak and who does not. He argues that someone could be arrested simply for refusing to leave. These are not the facts in the present case. Commander Sade did not attempt to suppress the Petitioner's message. He was not told initially that he had to leave the area. In fact, Commander Sade asked the Petitioner to move eight feet away from his original position in order to allow the free flow of pedestrian traffic. Further, the Petitioner was free to remain on private Gateway property – he could have easily displayed his sign inside the ballpark. It was only when he refused to move a few feet over, after repeated requests to do so, that Commander Sade had no other option but to arrest the Petitioner.

Further, the Petitioner incorrectly cites *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), to support his argument that Gateway officials were vested

with unfetterd discretion regarding the exclusion of demonstrators. *Lakewood* does not apply to the case bar and is clearly distinguishable from the instant case. *Lakewood* involved a prior restraint on speech. The city ordinance granted the licensor the power to deny permits for news stands. The ordinance did not have a set criteria for determining how to deny a permit. Without any guideposts, the licensor could grant and deny permits on an ad hoc basis. *Id.* The Court held that this was an "illegitimate abuse of censorial power." *Id.* at 758.

In the present case, there was no licensing mechanism controlling speech at Gateway, thus there was no prior restraint against the Petitioner's speech. Commander Sade observed a potentially hazardous situation, so he requested that the Petitioner move a few feet. Commander Sade further testified that Gateway's policy forbids anyone from selling tickets, scalping tickets, handing out paraphernalia, and any kind of demonstration that would cause inconvenience and danger to fans in the area. The Criminal Trespass ordinance applies to everyone. No one is permitted to impede the flow of traffic at Gateway. Any person, not just the Petitioner, who creates a safety hazard at Gateway is asked to move.

CONCLUSION

Gateway Corporation is a private corporation, not an arm of local government. Gateway Corporation built, and currently controls and operates, the professional sports complex in downtown Cleveland, home to Jacobs' Field and Gund Arena. Gateway Corporation was formed

under Ohio Revised Code section 307.696 which authorized local governments to enter into agreements with private entities for the purpose of developing sports complexes similar to the Gateway complex. The Ohio legislature did not mandate the formation of Gateway Corporation. The Legislature simply allowed any city in Ohio to enter into an agreement with private entities to pursue the development of sports complexes. The Greater Cleveland New Stadium Corporation, which eventually merged into Gateway Corporation, bought the land from the City of Cleveland. Gateway Corporation then built the complex, and currently owns and operates, the property. Further, Gateway Corporation can enter into any lease necessary to operate the complex.

The Petitioner, in the instant case, held his protest on private property an hour before a sold-out Cleveland Indians game. The Petitioner was arrested for Criminal Trespass as he was on private property and refused to move eight feet to the side when Gateway officials noticed that the Petitioner was creating a safety hazard for fans attempting to enter the game. The Petitioner was on private property at the time of his arrest, thus he is not subject to the full protection of the First Amendment.

If Gateway's property is found to be a public forum, arresting the Petitioner under the Criminal Trespass ordinance was a reasonable time, place and manner restriction. Enforcement of the ordinance was content-neutral. Security was not attempting to suppress the Petitioner's message. The restriction was narrowly tailored to serve a significant government interest. Gateway officials were concerned about the orderly flow of pedestrian traffic and the safety hazard, as fans had to walk into a busy

downtown street to avoid the Petitioner's sign. Finally, the Petitioner was afforded ample opportunity to communicate his message to his intended audience. Security asked the Petitioner to display his sign a mere eight feet from his original position. The Petitioner refused to move and was arrested. The time, place and manner restriction was reasonable as officials were not attempting to suppress the Petitioner's message, but to ensure the safety of the thousands of fans attempting to enter Jacobs' Field for the last game before the Major League Baseball strike. Therefore, the Respondent requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

GEORGE A. PACE, JR. – 0043956
First Assistant City Prosecutor
Justice Center – 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 664-4850

Counsel of Record
for the Respondent